Supreme Court, U.S.
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NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

TOMAS VENTE SINISTERRA,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE FIFTH CIRCUIT PANEL OPINION ERRONEOUSLY APPLIED THIS COURT'S DECISION IN *CALIFORNIA V. CARNEY, 471 U.S. 386 (1985)*, AND IGNORED THIS COURT'S DECISION IN *COOLIDGE V. NEW HAMPSHIRE, 403 U.S. 443 (1971)* IN DECIDING THAT THE AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT APPLIES TO A VEHICLE LAWFULLY PARKED IN A PRIVATE PARKING LOT WHEN THERE IS NO DANGER OF THE VEHICLE BEING MOVED, NO EXIGENT CIRCUMSTANCES AND SUFFICIENT OPPORTUNITY TO OBTAIN A SEARCH WARRANT WITH NO ADDED POLICE INVOLVEMENT.

LIST OF ALL PARTIES

1. Tomas Vente Sinisterra
2. Chris Flood
3. United States of America

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF ALL PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

BASIS FOR JURISDICTION 1

OPINIONS AND JUDGMENTS ISSUED IN THE COURTS BELOW 1

CONSTITUTIONAL PROVISIONS INVOLVED . . . 2

STATEMENT OF THE CASE 2

REASONS FOR ALLOWANCE OF THE WRIT . . . 4

ARGUMENT 5

A. WARRANTLESS SEARCHES OF AUTOMOBILES SHOULD ONLY OCCUR WHERE THE CIRCUMSTANCES MAKE A WARRANTED SEARCH IMPRACTICABLE. 5

B. THE FIFTH CIRCUIT'S PANEL OPINION IS CONTRARY TO ITS PREVIOUS DECISIONS IN *UNITED STATES V. REED*, 26 F.3d. 523 (5th Cir. 1994) AND *UNITED STATES V. MCBEE*, 659 F.2d. 1302 (5th Cir. 1981). 7

CONCLUSION 9

APPENDIX A 1a

APPENDIX B 6a

TABLE OF AUTHORITIES

Cases

California v. Carney
471 U.S. 386 (1985) i,6

Carroll v. United States
267 U.S. 132, 45 S.Ct. 280,
69 L.Ed. 543 (1925) 4-5,8

Chambers v. Maroney
399 U.S. 42, 90 S.Ct. 1975,
26 L.Ed.2d 419 (1970) 4, 5

Coolidge v. New Hampshire,
403 U.S. 443 (1971) . . . . . i, 4, 5, 6, 7

United States v. McBee
659 F.2d 1302 (5th Cir. 1981) 5, 7

United States v. Reed
26 F.3d. 523 (5th Cir. 1994) 5, 7

Statutes

21 U.S.C. §841(a)(1) 1

28 U.S.C. §1254(1) 1

Miscellaneous

Fourth Amendment to the
United States Constitution 2, 5, 7

The Petitioner, Tomas Vente Sinisterra, praying that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued on February 21, 1996, files this his Petition for Writ of Certiorari saying more particularly in support thereof as follows:

BASIS FOR JURISDICTION

This is an appeal of an order in the United States Court of Appeals for the Fifth Circuit rendered on February 21, 1996 reversing the order of the trial court granting Petitioner's Motion to Suppress Evidence. Petitioner timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc which was denied on March 20, 1996. This court has jurisdiction of this matter by reason of 28 U.S.C. §1254(1).

OPINIONS AND JUDGMENTS ISSUED IN THE COURTS BELOW

Petitioner Sinisterra was charged in a single count indictment with having possessed with the intent to distribute five or more kilograms of cocaine in violation of 21 U.S.C. §841(a)(1). He moved to suppress the evidence gained by the government as a result of the warrantless seizure and search of his automobile. The district court granted the motion, as evidenced by its Order Suppressing Seized Evidence annexed hereto as "Appendix A".

The government sought an interlocutory appeal to the United States Court of Appeals for the Fifth Circuit who reversed the district court's order. The panel opinion, annexed hereto as "Appendix B", concluded that: (1) there is no constitutional difference in seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant, (2) the automobile exception to the

warrant requirement applies when a vehicle is found stationary in a place not used for residential purposes and an independent finding of exigent circumstances is not necessary; and (3) there is no constitutional difference between a private parking lot and a public street.

Petitioner timely and properly filed his Petition for Rehearing and Suggestion for Rehearing En Banc and the same was denied on March 20, 1996.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution says:

> "The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On January 23, 1995, federal law enforcement agents received information that narcotics related activity was occurring at 7306 Vale View, a residence in Houston, Texas. After lengthy surveillance, government agents saw Petitioner drive up to the residence in a green Nissan with a female passenger. The agents observed Petitioner exit the vehicle and enter the residence. The female passenger then drove the vehicle to a second residence in the neighborhood. Petitioner left 7306 Vale View, driving a brown Dodge van and met with his previous passenger in the Nissan. The two

vehicles departed the Vale View residence and Petitioner drove the van slowly in an effort to allow the Nissan to keep up in heavy traffic.

Petitioner drove the van to a shopping mall and lawfully parked in a parking space in the privately owned parking lot. Petitioner exited the van with a small dog, made a telephone call at a public telephone and then proceeded to the automotive center located in the mall parking lot. Petitioner tied the dog to a mechanic's toolbox in the automotive center and left.

Agents maintained surveillance of Petitioner who walked to a medical professional building nearby, made another telephone call, and boarded a city bus travelling approximately one and one-half miles before exiting the bus and proceeding on foot into a residential neighborhood.

From the time Petitioner first arrived in the mall parking lot, agents kept continuous surveillance on the van. After approximately one hour, Houston Police officers arrived at the mall with a narcotics detecting canine who approached the van and alerted positively to the presence of controlled substance within the van. After the dogs reaction, officer Willie Davis and agent Mark Fluitt were dispatched to obtain a warrant from a neutral and detached magistrate.

Approximately two hours later, and while maintaining continuous surveillance of the van, agents observed Petitioner return to the mall in the green Nissan with his prior female passenger. Petitioner retrieved the dog tied to the toolbox and proceeded across the parking lot, stopping at a nearby strip center. Upon observing this, the agents stopped and arrested Petitioner.

The two hours between the narcotic dog's reaction and Petitioner's detention, there was no attempt to obtain a telephone warrant. After arresting Petitioner, agents searched the green Nissan and found no contraband or evidence of narcotics related activity.

After Petitioner's arrest, a United States Customs Service agent returned to the van in the parking lot and looked inside the van with a flashlight. The agent observed kilogram sized packages, which in the agent's experience, he recognized as packages of narcotics located under the back seat of the van. Those observations were passed on to Assistant United States Attorney, Ruben Perez, who informed the officers that no warrant was necessary and no further attempts should be made to obtain a warrant.

Despite having the occupant of the vehicle in custody, and the keys to the vehicle, agents decided to seize the van from the private parking lot, tow it to the Houston Police Department and search it. Agents stopped all attempts to procure a warrant. Approximately 200 kilograms of cocaine were seized as a result of the search of the van.

REASONS FOR ALLOWANCE OF THE WRIT

1. The Fifth Circuit's Panel Opinion conflicts with this court's decisions in *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925) and *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 20, 29 L.Ed.2d 564 (1971), in finding that a warrantless search of an automobile can occur when there are circumstances which made obtaining a search warrant practicable.

2. The Fifth Circuit's panel opinion conflicts with prior decisions of the Fifth Circuit in *United States v. Reed*, 26 F.3d. 523 (5th Cir. 1994) and *United States v. McBee*, 659 F.2d 1302 (5th Cir. 19_1).

3. The Fifth Circuit's panel opinion violates the Fourth Amendment by allowing warrantless searches of automobiles where there are no exigent circumstances.

ARGUMENT

A. WARRANTLESS SEARCHES OF AUTOMOBILES SHOULD ONLY OCCUR WHERE THE CIRCUMSTANCES MAKE A WARRANTED SEARCH IMPRACTICABLE.

As this court has repeated over and over, a warrantless search is unreasonable subject to certain exceptions. "One of those exceptions is that a 'warrantless' search of an automobile with probable cause is justified where circumstances make a warranted search impracticable." *Chambers v. Maroney*, *supra*; *Carroll v. United States*, *supra*. In fact, this court in *Coolidge v. New Hampshire*, *supra*, held:

> "the word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears. Surely there is nothing in this case to invoke the meaning and purpose of *Carroll v. United States* - no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile." *Id.* at 461-62, 92 S.Ct at 2035-36.

In *Coolidge* the police had spent over two weeks investigating the murder of a fourteen year-old girl suspecting Coolidge and his car of being involved in the murder. This court held that the automobile exception did not apply because on the night of Coolidge's arrest, there was no indication the car was being used for any illegal purpose and it was legally parked in the driveway of his house. This court further held that there was no way Coolidge could have gained access to the car once the officers had arrested him and that the only other occupant of the residence, Ms. Coolidge, had been taken by police to the home of some relatives and consequently had access neither to the house or the car. Also significant in this court's decision in *Coolidge*, was that the house was guarded through the night by two police officers. In other words, there were truly no exigent circumstances to search Coolidge's vehicle without a warrant.

In the present case, the only occupant of the vehicle was in custody and at the time of the search, agents had maintained continuous surveillance of the van for over three hours. No one had approached the van or attempted to gain access to the van in any way. If someone had, agents testified that the individual would have been detained and the officers testified that there was no danger of the van being moved.

Instead of relying on this court's opinion in *Coolidge v. New Hampshire*, *supra*, the Fifth Circuit panel erroneously applied this court's decision in *California v. Carney*, 421 U.S. 386 (1985).

In *Carney*, this court upheld the warrantless search of a motor home parked in a downtown San Diego parking lot. This court's decision in *Carney* dealt primarily with the issue of whether a motorhome was afforded more protection than

an automobile due to its increased likeness to a residence. The distinction between the facts in *Carney*, *supra*, and the facts in the present case as well as the facts in *Coolidge v. New Hamphshire*, are obvious. Most significant is the fact that in *Carney*, an occupant of the motorhome was asked to step out by the officers and after stepping out, agents conducted the search. If the officers had left to obtain a search warrant, it was possible, even likely, that Carney would have driven the motorhome off the lot, thereby exhibiting its ready mobility. In this case, the district court found that there were no exigent circumstances which would make the obtaining of a search warrant impracticable because "...the evidence, if any to be found, was not at risk or subject to be removed from the location." *See* "Appendix A" at page 5.

The facts in this case are more similar to the facts surrounding this court's decision in *Coolidge v. New Hampshire*; that is, that petitioner was taken into custody away from the vehicle, there were no other occupants of the vehicle, there was no danger of the vehicle being moved, and the vehicle was located on private property. This court should restore some meaning to the warrant requirement stated in the Fourth Amendment to the United States Constitution by refusing to apply the automobile exception to a situation where there are no exigent circumstances.

B. THE FIFTH CIRCUIT'S PANEL OPINION IS CONTRARY TO ITS PREVIOUS DECISIONS IN *UNITED STATES V. REED*, 26 F.3d. 523 (5th Cir. 1994) AND *UNITED STATES V. MCBEE*, 659 F.2d. 1302 (5th Cir. 1981).

The Fifth Circuit Court of Appeals in *Reed* and *McBee*, *supra*, required exigent circumstances before allowing the search of an automobile. In *McBee*, an

individual robbed a bank and a private citizen notified the police that he had observed a male fitting the description of the robber, park his car, walk into the bank, return to the car and drive away. A radio alert resulted in the policeman locating an unoccupied automobile matching the description of that given by the citizen. The officer observed inside the vehicle what appeared to be clothes matching the description of those worn by the robber. When residents of the community denied having knowledge of the vehicle, that had been abandoned on a pubic roadway, it was impounded. After impoundment, the vehicle was searched and McBee's identity was discovered. In holding that sufficient exigent circumstances existed, the Fifth Circuit said:

> "The fleeing bank robber had not been apprehended or even identified, and any evidence that could have informed the police of the identity and possible location of the robber, would have been subject to easy removal. (footnote omitted) This is clearly a case where an immediate search would have been proper, a case where it was 'not practicable not to secure a warrant because the vehicle could have been quickly moved out of the locality or jurisdiction in which the warrant would have been sought.' *Carroll v. United States*, 267 U.S. 132-153, 45 S.Ct. 280-285, 69 L.Ed.2d 543 (1925)."

Id. at 1305. In discussing *McBee* and granting Petitioner's motion to suppress, the district court found:

> "The evidence, if any to be found, was not at risk or subject to be removed from the location. In fact, the vehicle had been and was under continuous surveillance for some

three hours. Moreover, there is no evidence that the issuance of the warrant would have been delayed had the officers continued to pursue it.

Finally, unlike *McBee*, *supra*, the vehicle was not on a public street, but on private property.

Accordingly, this court finds and holds that in view of the totality of the evidence, the circumstances did not relieve the police officers of the duty to obtain a search warrant." *See* "Appendix A" at p. 5-6.

CONCLUSION

For these reasons, Petitioner respectfully prays that this Honorable Court will grant this Application for Writ of Certiorari and that Petitioner will be given further opportunity to brief and argue the issues raised herein.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
Plaintiff,	§	CRIMINAL ACTION
VS.	§	NO. H-95-34
	§	
TOMAS VENTE SINISTERRA,	§	
	§	
Defendant.	§	

ORDER SUPPRESSING SEIZED EVIDENCE

Pending before the Court is the defendant's motion to suppress the evidence seized from an unoccupied vehicle that had been parked on a shopping mall parking lot. The Court having reviewed the evidence is of the opinion that the motion shall be granted based on its findings and statements in the record and those stated here.

On or about January 23, 1995, the defendant, Tomas Vente Sinisterra, and a Latin female were observed arriving at and entering the residence at 7306 Valeview in Houston. Shortly thereafter, he was observed by police officers leaving the residence, driving a Dodge Caravan. During the course of an investigation concerning drug trafficking, police officers received information that the Valeview residence was being used by persons believed to be engaged in drug

trafficking. Without elaborating on the details, it is sufficient to state that the officers believed, after surveillance, that the defendant was also involved. Therefore, when the van left Valeview, it was followed.

The defendant, after engaging in counter-surveillance parked the van on the Memorial City mall parking lot, near the stores. After spending time in the mall and conducting himself as though he was waiting for someone, the defendant left. He visited the Sears Automotive Center, some distance across the lot, where he left a dog that had accompanied him in the van. He then hurriedly crossed the street and entered a building across the street from the mall. He then boarded a city bus and left the area. He was followed and later seen on foot retracing the route, coming back in the direction of the mall. The police lost sight of the defendant during this time but maintained surveillance on the van. While continuing surveillance of the van, the police officers saw the defendant again riding with the same Latin female that he was seen with earlier. They retrieved the dog from the Sears shop but never approached the van.

The police officers followed the defendant and stopped the vehicle about 200 years from the mall. After a discussion with various officers, the defendant refused to sign a consent to search the van. In the meantime, the police observed what they believed to be contraband in the van. Pursuant to these suspicions, a dog was brought in to sniff the vehicle. When the message was communicated to the officers that the dog had alerted on the van, the defendant was placed under arrest.

The police officers sought a search warrant through an assistant United States Attorney. They were informed that, because the packages were in "plain view" they did not need a search warrant for the vehicle. Thus, the vehicle was

seized and taken to the police station where it was impounded and searched.

DISCUSSION

The government argues that *United States v. McBee*, 659 F.2d 1302 (5th Cir. 1981), is dispositive on the issue of whether the search of the van was a valid one. They point to the "automobile exception" to the warrant requirement. In *McBee* a lone hooded male entered a bank and robbed it. A private citizen notified the police that he had observed a male fitting the description of the robber park his car, walk into the bank, return to the car and drive away. The citizen described the vehicle in substantial detail.

A radio alert resulted in a policeman locating an unoccupied automobile matching the description of that given by the citizen. The officer observed inside the vehicle, what appeared to be clothes matching the description of those worn by the robber. When residents of the community denied having any knowledge about the vehicle, it was impounded. After impoundment, the vehicle was searched and McBee's identity was discovered.

The court stated that in order to avoid a warrantless search under the "automobile exception" proof of both probable cause to search the vehicle and the existence of exigent circumstances is required. It should be and is noted that at the time of the search, the identity of the person having control over the vehicle was unknown. McBee had not been arrested. As well, the vehicle was parked on a public street and not under the watchful eye of a surveillance crew.

The facts in this case do not give rise to a *McBee* exception. Although the packages inside the van were

thought to be controlled substances, that fact, while it may give rise to an arrest based on probable cause, does not automatically give rise to a basis for a warrantless search. *See Arizona v. Hicks*, 480 U.S. 321 (1987); *see also Chambers v. Marian*, 399 U.S. 42 (1970). Moreover, because of the proximity of the van and the defendant at the time that the defendant was detained, it cannot be said that the search was incident to the arrest. *Chimel v. California*, 395 U.S. 752 (1969); *United States v. Johnson*, 16 F.3d 69 (5th Cir. 1994).

A probable cause warrantless search of an automobile is justified where circumstances make the obtaining of a search warrant impracticable. *United States v. Reed*, 26 F.3d 523 (5th Cir., 1994). *cert. denied*, 115 S.Ct. 1116 (1995). In addition to probable cause, however, exigent circumstances are required. See *Id.* at 528. The fact that a car is movable, alone, is not sufficiently exigent circumstance to justify a warrantless search. *Id.* at 528. Consequently, the Court turns to examine the facts to determine if the warrantless search was reasonable. *Id.*

The evidence shows that the police officers had probable cause for a detention and arrest and possibly a seizure of the vehicle. Unlike *McBee*, however, the person who could give permission to search the vehicle was already in custody and had refused to give permission for a search. When the defendant refused, a search warrant was sought. The effort to acquire a search warrant was abandoned, however, after an assistant United States Attorney told an unnamed officer that a search warrant was unnecessary.

Unlike *McBee*, the evidence, if any to be found, was not at risk or subject to be removed from the location. In fact, the vehicle had been and was under continuous surveillance for some three hours. Moreover, there is no

evidence that the issuance of the warrant would have been delayed had the officers continued to pursue it. Finally, unlike *McBee*, the vehicle was not on the public street but on private property.

Accordingly, the Court finds and holds that in view of the totality of the evidence, the circumstances did not relieve the police officers of the duty to obtain a search warrant.

The Court rejects the notion, if it exists, that the assistant United States Attorney's statement that, because the packages were in plain view, no warrant was required. Such advice does not excuse the police offices' action based on "good faith." Only when a detached neutral person makes such a statement and the police officer relies upon it, does the exception apply. *See Illinois v. Gates*, 462 U.S. 213 (1983); *see also United States v. Leon*, 104 S.Ct. 3405 (1984).

The defendant's motion to suppress is Granted.

It is so ORDERED.

Signed this 20th day of April, 1995.

/s/ Kenneth M. Hoyt
KENNETH M. Hoyt
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-20498
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

TOMAS VENTE SINISTERRA,
Defendant-Appellee.

Appeal from the United States District
Court for the Southern District of Texas

Before GARWOOD, DAVIS and BENAVIDES, Circuit Judges.

GARWOOD, Circuit Judge:

Appellee Tomas Vente Sinisterra (Sinisterra) is the defendant in pending criminal proceedings in the district court below in which he is charged with possession with intent to distribute of five kilograms or more of cocaine. The district court granted Sinisterra's motion to suppress approximately 200 kilograms of cocaine seized from an unoccupied van in a shopping center parking lot, and it denied the Government's motion for reconsideration. This

case is now before us on the Government's appeal of the district court's suppression order.[1]

Facts and Proceedings Below

The basic facts relevant to the suppression issue are not disputed. Federal agents placed a house located at 7306 Daleview in Houston, Texas, under surveillance based on information that the house was used for drug-related activities. The agents saw Sinisterra arrive in a green Nissan and enter the house. Shortly thereafter, a woman came out of the house and drove the Nissan around the neighborhood, making brief stops at two houses. The agents concluded that the woman was making a "heat run." The woman returned to 7306 Daleview and entered the house. She was inside the house for approximately one minute; then she left and drove away in the Nissan. Sinisterra left the house in a brown Dodge van and caught up with the woman. The brown van and the Nissan drove slowly in tandem for some time; when the Nissan turned off, agents followed the van. Sinisterra drove the van to a shopping mall, Memorial City Mall, parked in the mall's public parking lot, and got out of the van with a small dog. He made a call from a pay telephone and walked around the mall. He went into a Sears Automotive Center and tethered the dog in a service bay. He walked to a nearby medical office building and made another telephone call. After about twenty minutes, he left the medical building and got on a city bus. He rode the bus for about one and one-half miles, then he got off and began

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[1] A motions panel of this court denied Sinisterra's motion to dismiss the appeal on the grounds that the Government had not timely complied with the interlocutory appeal certificate requirements of 18 U.S.C. § 3731. We agree with the decision of the motions panel as well as with its admonitions to the Government in regard to the certificate requirements of § 3731.

to walk back towards the mall. He stopped at a food store to make a telephone call and then he walked into a residential neighborhood where the agents "lost" him.

The unoccupied van was under continuous surveillance, but no one approached it. Houston Police officers walked a trained narcotics-detecting dog around the van, and the dog alerted strongly to the van. An officer then looked into the van's window (without entering or opening the van) and saw two large duffle bags. Two officers left to obtain a search warrant. While the officers were gone, Sinisterra and the woman returned to the parking lot in the green Nissan. Sinisterra retrieved his dog, but he did not go near the van. He drove the Nissan out of the mall parking lot and stopped at a pay telephone in a nearby strip shopping center, about 100 yards away from the van. Agents detained him before he could make a telephone call and asked him to explain his behavior. A Spanish-speaking officer obtained Sinisterra's permission to search the Nissan, but Sinisterra refused to consent to a search of the van. Sinisterra was placed under arrest and the Nissan was searched, but it did not contain any contraband.

By this time, it was night. Andy Fullerton, a U.S. Customs Agent with over twenty years' experience, looked through the windows of the van with a flashlight. Agent Fullerton saw several kilogram-size, cellophane-wrapped packages. One of the packages was marked with a logo and had the name "Lotus" printed on it. Agent Fullerton testified that it was his experience that packages marked in this way always contained either cocaine or marihuana. When the officers who were charged with obtaining the warrant told an assistant U.S. Attorney of Agent Fullerton's discovery, the assistant U.S. Attorney advised that a warrant was unnecessary, and all efforts to obtain a warrant ceased. The van was then towed to the police department where a

warrantless search revealed approximately 200 kilograms of cocaine.

After a suppression hearing, the district court held that Sinisterra had standing to challenge the search of the van, a holding the Government does not challenge on this appeal. The district court also determined that the officers had probable cause to arrest Sinisterra, but it held that Sinisterra's relationship to the van at the time of his arrest was too attenuated for the evidence to be admissible as seized in a search incident to arrest. The court held that the plain-view exception to the warrant requirement authorized the officers to seize the van without a warrant, but that they could not search the vehicle without a warrant or consent. Citing *United States v. McBee*, 659 F.2d 1302, 1304 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982), the court held that the automobile exception to the warrant requirement requires both probable cause and exigent circumstances. The court determined that the search was not justified by exigent circumstances because the police had a valid basis to seize the vehicle and, thus, could have obtained a warrant at their leisure.[2] The court further reasoned that the automobile

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[2] In its oral ruling on the motion to suppress, the district court stated "that is not an [sic] in dispute here, whether or not the contraband [in the van] was in plain view provides a basis for the arrest of the defendant. And the answer, I believe, is, yes, that that would provide a basis for the arrest of the defendant"; and, "[t]he whole basis of this defendant's arrest centers, it seems to me, on the probable cause to arrest, which obviously, in my opinion, existed"; and, [s]o the evidence . . . does not suggest that any exigent circumstances existed . . . . the fact that the vehicle itself was seized and was taken to the police lot gives rise to the fact that there was no exigent circumstance, because, in my view, the police had a valid basis for seizing the vehicle and holding it"; further "I think there was probable cause for the arrest, I think there was probable cause for seizures [sic] of the vehicle based upon what they saw and believed to be in the vehicle"; and finally "[t]hey seized the vehicle, which I think they were totally entitled to do, they did not have the right

exception to the warrant requirement did not apply because the van was parked in a privately owned parking lot.[3] Consequently, the district court granted the motion to suppress.

Discussion

The Government argues, *inter alia*, that the evidence is admissible under the automobile exception to the warrant requirement. We Agree.

This court reviews the district court's fact-findings on a motion to suppress for clear error and reviews de novo the "ultimate determination of Fourth Amendment reasonableness." *United States v. Seals*, 987 F.2d 1102, 1106 (5th Cir.), *cert. denied*, 114 S.Ct. 155 (1993). The district court's determination that the search of the van was

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to search it. They were seeking a search warrant, they should have gotten it, that's all." In its written order granting the suppression motion, the court recites that the motion was "granted based on its [the court's] findings and statements in the record and those stated here." The written order further states that "the police officers had probable cause for detention and arrest and possibly a seizure of the vehicle." It is entirely plain that the district court found that the officers had probable cause to believe that the van (when it was seized and searched) contained narcotics and that *that*-- plus the defendant's association with the van-- is what constituted probable cause to arrest the defendant.

[3] The district court also distinguished the result in *McBee*, where suppression was denied, on the basis that there "the vehicle was parked on a public street", while here "unlike *McBee*, the vehicle was not on the public street but on private property". The district court recognized that the mall parking lot, where the van was seized, was open to the public, but felt it was significant that the parking lot was privately owned. The Government urged that the parking lot was a "public area". The district court responded "sure. Anything outside the [mall] building is public, but that's private property" and not "the public streets".

unreasonable under the Fourth Amendment was based on certain erroneous legal assumptions.

First, the district court concluded that the officers had probable cause to arrest Sinisterra and to seize the van, but that they were prohibited from searching the van without obtaining a warrant. There is no constitutional difference between "seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." *Chambers v. Maroney*, 399 U.S. 42, 52 (1970).

Second, to the extent that *McBee* and its progeny require, in a situation such as the present, a finding of exigent circumstances other than the fact of the automobile's potential mobility, they are inconsistent with more recent Supreme Court jurisprudence. The Supreme Court has held that the automobile exception to the warrant requirement applies when a vehicle is "readily capable" of "being used on the highways" and it "is found stationary in a place not regularly used for residential purposes . . . ." *California v. Carney*, 105 S.Ct. 2066, 2070 (1985). Under these circumstances "overriding societal interests in effective law enforcement" justify an immediate warrantless search because (1) "the vehicle is obviously readily mobile by the turn of an ignition key . . ." and (2) it is subject to a "reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling." *Id.*

Finally, the district court attached importance to the fact that the car was parked in a shopping center parking lot--rather than on a public street--at the time it was seized. For

the reasons discussed below, this fact is not determinative of the legality of the seizure and subsequent search here.

In *Carney*, the Supreme Court upheld the warrantless search of a motor home parked in a downtown San Diego parking "lot". *Id.* at 2067. Drug Enforcement Agency (DEA) agents had information that Carney and other persons were engaging in sex in the motor home and paying their partners with marihuana. They searched the motor home without a warrant or consent and discovered a quantity of marihuana and drug paraphernalia. The California Supreme Court suppressed the drugs and reversed Carney's conviction for possession of marihuana. The Supreme Court granted certiorari and reversed because it concluded that the automobile exception to the warrant requirement applied. *Id.* at 2070.

This court has concluded that, under *Carney*, "probably cause *alone* suffices to justify a warrantless search of a vehicle lawfully parked in a public place, as long as the scope of the search is reasonable." *United States v. Cooper*, 949 F.2d 737, 747 (5th Cir. 1991) (quotation omitted' emphasis in original), *cert. denied*, 504 U.S. 975 (1992). Sinisterra argues that *Coolidge v. New Hampshire*, 403 U.S. 443, 461-62 (1971), and *United States v. Reed*, 26 F.3d 523, 530 (5th Cir. 1994). *cert. denied*, 115 S. Ct. 1116 (1995), dictate that exigent circumstances were required to justify a warrantless search of the van.[4] *Coolidge* and *Reed* are distinguishable because both cases involved vehicles parked in the driveways of the residences of the defendants (who

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[4] Sinisterra does not suggest that the duffle bags should not have been searched incident to the search of the van. *See California v. Acevedo*, 500 U.S. 565, 580 (1991) (containers in an automobile may be searched if there is probable cause to believe that they contain contraband).

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were in custody). *See Coolidge*, 403 U.S. at 447; *Reed*, 26 F.3d at 525. *Carney* controls this case because of the similarity of the factual situations, Here, the mall parking lot was not related to anyone's residence, it was open to the public and available for public use, and Sinisterra had no more right in it than any member of the public. That the lot was owned by the mall--and not by the city--is irrelevant in these circumstances.[5]

This court has applied the automobile exception to admit evidence seized in warrantless searches of vehicles which were legally parked in privately-owned motel parking lots where there was probable cause to search but no showing of exigent circumstances. *United States v. Buchner*, 7 F.3d 1149, 1150-51, 1154-55 (5th Cir. 1993) (LaQuinta Motel), *cert. denied*, 114 S.Ct. 1331 (1994); *United States v. Ervin*, 907 F.2d 1534, 1536-39 (5th Cir. 1990) (Big Bend Motor Inn Motel). The rule applicable here is that if, under the totality of the circumstances, officers have probable cause to believe that a vehicle contains contraband, they are authorized to search the van without a warrant. *Buchner*, 7 F.3d at 1154-55; *Seals*, 987 F.2d at 1107.

Here, in addition to the dog alert, the officers were also aware of the informant's tip; Sinisterra's unusual behavior that afternoon; and the fact that Agent Fullerton had recognized that the packages in the van contained narcotics. Probable cause was thus clearly established. *See United States v. Williams*, 69 F.3d 27, 28 (5th Cir. 1995); *United States v. Mendez*, 27 F.3d 126, 129-130 (5th Cir. 1994); *United States v. Hernandez*, 976 F.2d 929, 930 (5th Cir. 1992); *United States v. Gonzalez-Basulto*, 898 F.2d 1011,

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[5] Nothing in *Carney* indicates that the parking "lot" there was publicly owned.

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1013 (5th Cir. 1990); *United States v. Davila-Avila*, 895 F.2d 206, 207 (5th Cir. 1990).

Because the officers had probable cause to believe that the van--which was in operational condition and was parked in the mall parking lot which was open to the public (at least those shopping at the mall) though not publicly owned--contained narcotics, they were legally authorized to search it without a warrant, even if the circumstances were not exigent.[6] The district court hence erred in granting the motion to suppress.

Accordingly, the district court's order granting Sinisterra's motion to suppress is REVERSED.

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[6] Because of our holding in this respect, we do not determine whether suppression should have been denied either on the inevitable discovery doctrine or on the theory that the officers acted on the reasonable, good faith belief that a warrant was not required.